85

Office-Supreme Court, U. S.
FILED
NOV 29 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 452

THE VILLAGE OF SKOKIE, ILLINOIS,
Petitioner,

vs.

THE FIRST NATIONAL BANK AND TRUST COMPANY, OF RACINE, WISCONSIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HENRY L. WELLS,
CHARLES C. WOOSTER,
EMMETT J. MCCARTHY,
JOSEPH J. WITRY,
GEORGE R. LYON,
Attorneys for Petitioner, Village of Skokie, Illinois.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Brief	6
Jurisdictional Statement	3
Opinion of the Court of Appeals	37
Opinion of the District Court	33
Petition	1
Questions Presented	3
Reasons Relied On for Allowance of the Writ	4
Summary and Short Statement	1

List of Authorities Cited.

City of Alton v. Foster, 207 Ill. 150, 69 N. E. 783	8
City of Chicago v. Brede, 218 Ill. 528, 75 N. E. 1044	10
City of Pontiac v. Talbot Paving Co., 94 Fed. 65	7
Continental Casualty Co. v. First National Bank of Temple, 116 Fed. 2nd 885	28
Conway v. City of Chicago, 237 Ill. 128, 86 N. E. 619	12
Donahue v. Village of LaGrange, 263 Ill. 607, 105 N. E. 762	12
Farrell v. City of Chicago, 198 Ill. 558, 65 N. E. 103	12
Fidelity Trust Co. v. Village of Stickney, 129 Fed. 2nd 506	12
McCandless v. United States, 298 U. S. 342	29
Midland Lumber Co. v. Dallas City, 276 Ill. 172, 114 N. E. 580	12
National Protective Legion v. Village of Brookfield, 228 Ill. App. 311	11
Rothschild v. Village of Calumet Park, 350 Ill. 330, 183 N. E. 337	12

Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906.... 28
Village of Hartford v. First National Bank of Wood River, 307 Ill. App. 447, 30 N. E. 2nd 524..... 30
28 U. S. C. A. 1254 (1)..... 3
Ill. Rev. Stat. 1951, Chap. 24, sec. 84-73..... 7
Ill. Rev. Stat. 1951, Chap. 24, sec. 84-86..... 7
Ill. Rev. Stat. 1951, Chap. 24, sec. 84-89..... 20
Ill. Rev. Stat. 1951, Chap. 24, sec. 84-90..... 1-7

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. .....

THE VILLAGE OF SKOKIE, ILLINOIS,
Petitioner,

vs.

THE FIRST NATIONAL BANK AND TRUST COMPANY, OF RACINE, WISCONSIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

The suit is brought by the First National Bank and Trust Company of Racine, Wisconsin, as the holder of special assessment bonds issued pursuant to the Local Improvement Act of the State of Illinois, against the issuing municipality, Village of Skokie, Illinois. The suit involves the liability of the muncipality to the bondholder for money allegedly collected by the municipality from property owners in payment of the special assessment.

The Illinois statute involved is the following section of the Local Improvement Act:

(No claims except against the assessment.) No per-

son accepting the vouchers or bonds as provided in this article shall have any claim or lien upon the municipality in any event for the payment of his vouchers or bonds or the interest thereon, except from the collection of the assessment against which the vouchers or bonds are issued. The municipality, nevertheless, shall not be in any way liable to the holders of these vouchers or bonds in case of a failure to collect the assessment, but with all reasonable diligence, so far as it can legally do so, it shall cause a valid special assessment or assessments, a special tax or taxes, as the case may be, to be levied and collected, to pay these bonds and vouchers, until all bonds and vouchers are fully paid. Any holder of vouchers or bonds, or his assigns, shall be entitled to summary relief by way of mandamus or injunction to enforce the provisions of this section. (Ill. Rev. Stat. 1951, Chap. 24, Sec. 84-90.)

The suit was referred to a special master in chancery who found that the respondent had satisfactorily proved the collection of money by the petitioner and was entitled to judgment. The District Court sustained the petitioner's exceptions to the master's report, holding as a matter of law that the evidence upon which the master's report was based was inadmissible and that without this inadmissible evidence the respondent had failed to prove the collection of cash.

On appeal by the respondent the Court of Appeals pronounced a "trust accounting" theory entirely new to the special assessment law of Illinois, held that the disputed evidence was sufficient to establish the collections, reversed the judgment of the District Court, and directed the entry of judgment in accordance with the master's report.

BASIS ON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION.

This Court's jurisdiction is invoked under 28 U. S. C. A. Sec. 1254 (1) and that part of Rule 38.5 (b) of this Court which includes a decision of a Court of Appeals on an important question of local law in a way probably in conflict with applicable local decisions.

The petitioner's petition for rehearing was denied on August 31, 1951.

The questions involved are substantial because the decision creates a new "trust accounting" doctrine of municipal liability which will apply to every municipality in Illinois with outstanding special assessment bonds. The importance of the decision is evidenced by the fact that the Illinois Municipal League sought leave to intervene in the Court of Appeals in an effort to have the decision modified.

THE QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in creating the "trust accounting" theory of municipal liability and thus creating an "event" in which the municipality becomes generally liable on special assessment bonds without affirmative proof of collections and despite the Illinois Local Improvement Act and the court decisions that the municipality shall not be liable "in any event" except from actual cash collections.

2. Whether the municipality can be held liable on purely opinion evidence, either on a "trust accounting" theory or any other theory.

3. Whether the Court of Appeals erred in denying the petitioner's cross-appeal.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. Under the Illinois Local Improvement Act the installation of an improvement for a particular locality within a municipality is specifically made a matter of private benefit and private liability for the owners of the property thus improved. The legislature has provided that the holders of the special assessment bonds shall have no claim or lien against the municipality *in any event* except from the money actually collected in payment of the special assessment. The courts of Illinois have uniformly required the bondholder to prove affirmatively that the municipality has collected money of which he has not received his share. The federal courts have fully respected this legislative intention. The decision in this case through the "trust accounting" theory casts the burden of disproving collections on the municipality and thus creates an "event" in which the municipality can become generally liable for money which it did not collect, solely as a result of the inconclusiveness of the municipal records. The decision is in conflict both with the applicable decisions of the courts of Illinois and with the prior decisions of the federal courts.

2. The decision of the Court of Appeals sets a legal standard of proof by opinion evidence which is in conflict not only with the applicable decisions of the courts of Illinois but also with decisions of both the federal courts and the courts of all other states.

3. The decision of the Court of Appeals fails to recognize that municipal liability cannot be created by an admission by counsel of a liability later shown not to exist, and that costs should not be assessed where there is no liability, as urged in the petitioner's cross-appeal.

THE OPINIONS.

The opinion of the District Court was not printed and the opinion of the Court of Appeals has not as yet been printed. Copies of both opinions are set forth in the appendix to this petition.

CONCLUSION.

The petitioner respectfully prays that it be granted a writ of certiorari directed to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

HENRY L. WELLS,
CHARLES C. WOOSTER,
EMMETT J. MCCARTHY,
JOSEPH J. WITRY,
GEORGE R. LYON,
Attorneys for Petitioner, Village of Skokie, Illinois.

BRIEF IN SUPPORT OF PETITION.

I.

THE LIMITED LIABILITY OF A MUNICIPALITY TO PAY SPECIAL ASSESSMENT BONDS OUT OF SPECIAL ASSESSMENT COLLECTIONS CANNOT BE CONVERTED INTO A GENERAL LIABILITY EXCEPT BY AFFIRMATIVE PROOF THAT THE COLLECTIONS HAVE BEEN MADE.

The basic purpose of the Illinois Local Improvement Act is not to provide a method for financing general municipal improvements, but is rather to provide a method by which the owners of property in a particular *locality* within a municipality may secure an improvement not common to the municipality as a whole. A local improvement is not made for the benefit of all of the citizens, nor is it inaugurated by the municipality. Be it a water main, a sidewalk, a sewer or a pavement, the impetus for installation comes from the owners of the abutting property which will be benefited. Local improvements are a matter of private benefit for those whose property is served by the water main, the sidewalk, the sewer or the pavement.

The improvement in this case is a sewer system. It is a large improvement, benefiting about one third of the property in the village, but it is nevertheless a *local* improvement with no direct benefit to the other two-thirds of the village.

The private nature of the benefit is the basic reason why the Illinois legislature provided that the cost shall not *in any event* become a public charge except for money actually collected. A municipality does not pledge its credit for the payment of special assessment bonds. Every bond is made "payable solely out of said installment when col-

lected." Ill. Rev. Stat. 1951, Chap. 24, sec. 84-86. A municipality normally delivers the bonds to the contractor who installs the improvement in payment for his work. Payment of the bonds is a matter between the owners of the assessed property and the contractor or those to whom he sells the bonds. The municipality acts only as the agency to which payments are made and by which cash collections are distributed.

The Illinois Local Improvement Act makes clear, even emphasizes, this basic concept of limited municipal liability. It provides that neither the contractor nor the bondholder shall have "any claim or lien against the municipality in any event" except from the actual collection of the assessment. Ill. Rev. Stat. 1951, Chap. 24, sec. 84-73, 84-90.

For over fifty years special assessment bondholders have tried various schemes and theories to circumvent the plain language of the statute that they shall have no claim against the municipality *in any event* except for payment from collections. The only cases in which the bondholders have been successful are those in which they affirmatively proved the collection of cash which had not been distributed to them. Without such affirmative proof both the courts of Illinois and the federal courts have uniformly refused to convert this special liability into a general liability of the municipality.

The earliest federal court case is *City of Pontiac* v. *Talbot Paving Co.*, 94 Fed. 65, which was decided in 1899 by the Court of Appeals for the Seventh Circuit. The plaintiff was the contractor who installed the improvement. For his work he was given vouchers payable out of the special assessment collections. The ordinance providing for the special assessment was later held invalid and no

collections were made. The plaintiff sued the city at law, and recovered judgment in the trial court. The opinion reversing the judgment contains the following:

> "The statute which confers authority for making the improvement in question imperatively requires that the expense, aside from street intersections, shall be borne by the abutting property, through special assessment, and shall not become a public charge 'in any event.' The provision is of general application to cities and villages in the state of Illinois, and is in accord with a rule of public policy which is common in municipal charters and is upheld by judicial authority. If, however, the contractor who performs work so authorized, has the right to recover the contract price against the municipality, by way of damages, in the event of neglect or refusal on the part of the public officers to perform their duty in enforcing the special assessments, the way is clearly open to evade and nullify the legislative purpose. By their conduct —either through negligence, ignorance, or collusion— the city council or officers may impose upon the public the expense of the improvement, in despite of the statute which declares it a special benefit to be paid exclusively by abutting lot owners. (p. 68.)
>
> * * * * *
>
> "* * * we are clearly of the opinion that no general doctrine of municipal liability for mere nonfeasance in the failure or neglect of council or officers to perform a duty of the municipality can be extended to override *per se* the inhibitions expressed in this statute, and that the contractor must proceed by mandamus to enforce his claim. The decisions in support of this view are well considered, and apparently without conflict. * * *" (p. 69.)

Under a similar set of facts the Supreme Court of the State of Illinois in the case of *City of Alton* v. *Foster*, 207 Ill. 150, 69 N. E. 783 (1904), reversed a judgment in favor of a contractor for the amount due him for the installation

of a local improvement. The following statement is taken from the decision:

"The ground of recovery insisted upon is the neglect and refusal of the city council of the appellant city to levy and collect, or make some effort, at least, to do so, a new or supplemental special assessment upon the property benefited, to meet the deficit above mentioned. The question is, then for the first time directly presented to this court, whether, under an ordinance and contract and the statute, all providing that the city shall not be liable to the contractor for the amount to be raised by special assessment, the city may nevertheless be held liable for such deficit, upon the ground that its officers and agents have neglected or refused to levy such special assessment. No reason is suggested why the city might not, by the ordinance, provide for the exemption claimed, or that the contractor has not made a valid and binding contract upon a sufficient consideration, or that there is any public policy or constitutional inhibition against the restriction of the right as found in the statute quoted; but, notwithstanding the plain language of the ordinance, the contract, and the statute that the city shall not be liable for such special assessment in any event, it is sought to read into the contract an exception to the terms and provisions of the ordinance, the statute and the contract itself, not there contained, and to declare that there is an event that may arise, and has arisen, namely, the failure and refusal of the city council to proceed to levy the new assessment, by which the appellant city becomes liable. The inauguration of the system of local improvements by special assessments was doubtless designed to enable localities requiring them, and able to build and pay for the same, to have improvements not common or general to the city, and for which the city generally would not need to incur an obligation or direct liability. From such local improvements the citizens generally, and those remote from the improvement, receive little or no benefit, and usually the portion that the public

pays for by general taxation is at the street intersections and the places exclusively the property of the public, and not bounding the property of any individual, and, as at present, the cost of the proceedings and collection of the assessment; and it would seem to be an injustice to the public or general taxpayers, of the city, if the municipality and the contractor could by some act, as between themselves, or by the failure of one or the other to do some act required by the contract or the law, render the general taxpayers, or the general fund of the city, which is derived from the general taxpayers, liable upon a contract for which the city was not primarily liable, and which it was expressly agreed it should not be liable for in any event. It must be apparent that, if such rule be adopted, such municipalities may become the easy prey of negligent or corrupt councils, and, under the guise and form of local improvements by special assessments, such improvements may be made in such localities as favoritism or other motive may direct, and the feigned or actual neglect or obstinacy of the official representatives of the municipality place upon the city the entire burden of the cost thereof." pp. 160-162.

The case of *City of Chicago* v. *Brede*, 218 Ill. 528, 75 N. E. 1044 (1905), was one in which a taxpayer sought to enjoin the expenditure of $150,000.00 by the Board of Local Improvements of the City of Chicago for the purchase of improvement bonds issued in anticipation of the collection of special assessments. The City had passed an ordinance authorizing "special funds to be used for the purchase of bonds, coupons, vouchers, when the respective funds against which bonds had been issued were exhausted and deficiencies arose on account of delays in collection." These bonds were to be deposited in special funds to be later reimbursed upon collection of the assessments. The city contended that the purpose of the stabilization fund was to preserve the integrity of its paper and its credit. The

Supreme Court in denying the City's appeal from the granting of the injunction said:

> "It will be seen from these provisions of the statute that it was the evident purpose and intention of the Legislature to in no way hold the city responsible or liable for the vouchers, bonds or interest. This is a positive statutory provision, which would have priority over paragraph 3 of section 62, art. 5, c. 24, as quoted by appellants. The city is powerless by any ordinance which it might pass to make itself liable in the face of the express provisions of the statute. While it might be of advantage to the city, and save money to the property owners and taxpayers, for the city to assume responsibility for the bonds thus issued, yet, in the absence of legislative authority, it is powerless so to do." p. 536.

The case of *National Protective Legion* v. *Village of Brookfield*, 228 Ill. App. 311 (1923), was a suit by the owner of special assessment bonds asking to make the municipality liable for a general judgment by reason of the fact that the attestation clause on the bonds recited "that the good faith and credit of the Village of Grossdale is pledged for the prompt fulfillment of the above promise." On appeal from judgment for the plaintiff, the judgment was reversed with the opinion containing the following statement:

> "From these rulings we infer that the judgment is based upon the theory that plaintiff was not under the necessity of proving the collection of the assessment in question, and that the variances from the form described by the statute had the effect of making the bonds a general liability on the part of the village. Both of these propositions are untenable.
>
> "The bonds by their terms were payable from the proceeds of the special assessment against which they were issued and the liability of the village is limited to the amount actually collected under the assess-

ment. Proof that there had been such collection was essential to establish plaintiff's right to recovery." p. 314.

In the case of *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 183 N. E. 337 (1932), a bondholder brought suit for a pro rata share of collections made by the village. The evidence affirmatively showed "that the village collected a part of the several installments against which defendant in error's bonds were issued" and used the money in full payment of bonds belonging to other bondholders without giving the plaintiff his prorata share of the money collected. The Court there held the plaintiff bondholder entitled to his share of the money affirmatively shown to have been collected, stating that:

> "When the defendant in error had shown that the village collected the money applicable to the payment of his bonds and had not paid them, he had met the burden imposed upon him and was entitled to judgment unless the plaintiff in error showed a valid defense." p. 342.

Other supporting cases are *Farrell* v. *City of Chicago*, 198 Ill. 558, 65 N. E. 103; *Conway* v. *City of Chicago*, 237 Ill. 128, 86 N. E. 619; *Donahue* v. *Village of LaGrange*, 263 Ill. 607, 105 N. E. 762, and *Midland Lumber Co.* v. *Dallas City*, 276 Ill. 172, 114 N. E. 580.

The most recent case and the case most directly in point on the facts and issues involved is *Fidelity Trust Co.* v. *Village of Stickney*, 129 F. 2nd 506, which was decided by the Court of Appeals for the seventh circuit in 1942. Because the case is so squarely in point and was recently decided, we include the greater part of Judge Minton's opinion:

> "The plaintiff, a resident of Pennsylvania, is the owner as trustee of five bonds, each for the principal sum of $1,000 of Series H and a like amount and num-

ber of Series I, issued by the defendant in anticipation of the collection of assessments authorized for the improvement of the streets of the Village of Stickney, Illinois. Series H contained thirty-five bonds of $1,000 each and Series I thirty bonds of $1,000 each. The bonds and interest were in default. The plaintiff brought suit, alleging that the defendant had collected the assessments; that the assessments so collected were a trust fund for the payment of the bonds; that the defendant had commingled the assessments collected with its funds, had used the collected funds for its own purposes, and had lost the same by depositing in banks that subsequently failed, and that the funds were otherwise misapplied by the defendant. An accounting and an injunction were prayed for.

"The evidence did not show that there was any appropriation of the collected assessments to pay the general obligations of the defendant. Neither was there any evidence that the funds were lost in closed banks. The general allegation of the complaint that funds collected 'have been otherwise misapplied by the defendant' is sufficient averment to support the evidence adduced in the case, so as to avoid the contention that there was a variance between the allegations of the complaint and the proof.

"The evidence showed that in each Series, H and I, six bonds had been received by the collector and cancelled. The matter was handled in two ways. First, Hammeda and Swobodka, who were not property owners whose property was liable for assessment, would buy a bond at very considerable discount. They would then turn the bond over to the village collector, whose duty it was to collect the installments under the assessment, with the understanding with the collector that the property owners designated by Hammeda and Swobodka could come in and pay a sum less than the amount of the installment due and receive a receipt in full for the installment. The collector kept track of the payments, and when a thousand dollars of installments had been liquidated, he cancelled the bond and the money that he had collected was turned over to

Hammeda and Swobodka, who made a profit. The collector received no part of the profit but he did receive some 'presents' from Hammeda and Swobodka.

"By the second method employed, Hammeda and Swobodka entered into an arrangement with the collector, which enabled them to carry out the following practice. Hammeda and Swokodka then contacted various property owners whose property was subject to the payment of the special assessments and agreed with such property owners that upon payment to Hammeda and Swobodka of such sums as the latter were willing to accept, Hammeda and Swobodka would secure for the property owners receipts showing payment in full of the various installments of the assessments against their property. Hammeda and Swobodka would then present to the collector the bills for the special assessments against the property of the owners who had made the payments to them. After marking the bills paid in full, the collector would deliver to the village treasurer as cancelled a sufficient amount of bonds belonging to Hammeda and Swobodka to equal the full amount of the installments of the assessments covered by the receipted bills. Under this method, no money came into the hands of the village collector or anyone else for the village.

"The court below found that these transactions were unauthorized by the statute. It held that the village had in effect collected the bonds in cash, and held the village liable to the plaintiff for its five-thirty-fifths part of the transaction on the Series H bonds and five-thirtieths part on the Series I bonds.

"(1) The questions presented are whether the transactions of receipting the bonds of the non-property owners, Hammeda and Swobodka, in the manner above indicated, were authorized, and if they were not, then was the village liable for the unauthorized acts of the village collector and to be charged with having collected the cash? The court below held these transactions were unauthorized and the village was liable as if the bonds had been collected in full in cash, and

gave judgment for the plaintiff's proportionate amount of the bonds, with interest and other relief.

* * * * *

"What was the liability of the village for the unauthorized handling of these transactions? In the first method, the village collector received money. How much does not appear in the record. He received the amount Hammeda and Swobodka told him to collect as against the bond or bonds handled under this method. This amount, as the master found, was probably about seventy-five per cent of the face value of the bonds.

"As to the second method, no money was received by the collector of the village. Hammeda and Swobodka had received the money in an amount undisclosed, but sufficient to satisfy Hammeda and Swobodka, who turned over to the village collector the bond or bonds for cancellation.

"(4) It has been clearly and repeatedly held by the courts of Illinois that money collected by the officers of a municipality in payment of special assessments levied for improvements constitutes a trust fund. *People ex rel. Anderson* v. *Village of Bradley*, 367 Ill. 301, 11 N. E. 2d 415; *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 183 N. E. 337; *Flanagan* v. *City of Chicago*, 311 Ill. App. 135, 155, 35 N. E. 2d 545; *Viehweg* v. *City of Mount Olive*, 298 Ill. App. 412, 19 N. E. 2d 211; *Siefker* v. *City, etc.*, 297 Ill. App. 113, 17 N. E. 2d 368; *Wells* v. *Village of Wilmette*, 193 Ill. App. 30. See also *Village of Brookfield* v. *Pentis*, 7 Cir., 101 F. 2d 516.

"(5) It seems clear to us that under the so-called first method by which money was collected by the collector of the village, the village is liable for the amount of money the collector received. This constituted a trust fund, for the integrity of which the village was unquestionably liable.

"(6) As for the balance which it did not collect, although it was its duty to collect it, the village is not liable. It could not be held its duty to preserve as

a trust fund that which it had never possessed. *Conway* v. *City of Chicago,* 237 Ill. 128, 136, 86 N. E. 619.

"(7) We come now to the second method, by which no money came into the hands of the village collector, and in which case Hammeda and Swobodka, the owners of the bond or bonds, had collected the money from the property owners in such amount as satisfied them and had then turned over the bond or bonds to the collector for cancellation. Under this method, no money came into the hands of the village collector. The trust fund theory could not apply because no fund was collected. The village collector had been guilty of an illegal act but the village, for the collector's default, neglect or mistake in the performance of his duty, cannot be held liable. This was clearly held in *Conway* v. *City of Chicago,* 237 Ill. 128, 138, 139, 86 N. E. 619, 622. This case states the rule that the liability of a municipality arising out of an assessment such as the one involved here is 'limited to the amount of the special assessments actually collected' for the improvements.

"In the *Conway* case, the city officials, acting under an erroneous view of the law, granted rebates to certain property owners. The city issued so-called abatement certificates to certain property owners and delivered these certificates to the collecting officer to be credited on the assessment owed by these property owners. The certificates were to be delivered finally to the city as so much money collected.

"In holding that the city was not liable for the amount of money represented by the certificates, the court said: 'Through a misapprehension as to the legal basis upon which the special assessment should have been levied, these rebates were left with the taxpayers. If appellant is required to pay appellee these rebates, the effect of it will be to establish a general liability against the city for the mere neglect, default or mistake of its officers in regard to the levying and collecting of a special assessment. It is true that appellant had no legal right to make such rebates, and all orders and proceedings purporting to author-

ize such rebates were null and void. * * * Appellee's remedy, in so far as the amount of these rebates is concerned, is by mandamus to compel the performance of whatever legal duties appellant is under in connection with the collection of these rebates from the taxpayers. It is suggested that difficulties arising out of the lapse of time will prevent the collection of the original assessment or the levying of a supplemental assessment covering these rebates. *However, this may be, we are not inclined to extend the general liability of a municipality for special assessments beyond that while results from a failure to pay over money actually collected by it.* These rebates never having come into the hands of the city in cash, it is not liable in an action of assumpsit for them, on the theory that by the exercise of due diligence in the discharge of its legal duties it ought to have collected them.' (Latter italics ours.)

"We therefore hold on the authority of the *Conway* case that as to those bonds delivered by Hammeda and Swobodka to the village collector for cancellation and against which no money was received by the collector, the village is not liable.

"(8) Before the trial the plaintiff filed under Rule 36 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, a request for an admission of facts. The request asked the defendant to admit that a number of bonds listed were cancelled on the dates set forth opposite the bonds listed. This the defendant admitted. But the plaintiff next asked the defendant to admit that none of these bonds were used by property owners to pay assessments. This the defendant refused to admit. This was no part of the plaintiff's prima facie case. The plaintiff made its case when it showed ownership of the bonds, maturity, collections made by the village, demand for payment and no payment. *People* v. *Village of Bradley*, 367 Ill. 301, 11 N. E. 2d 415; *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 342, 183 N. E. 337; *Allbee* v. *City of Aurora*, 306 Ill. App. 457, 28 N. E. 2d 742.

"After the plaintiff had made its prima facie case,

> it was then up to the defendant to explain what collections were made, if any, and what it did with them. If the plaintiff undertook such proof it was unnecessary and was an attempt to anticipate and forestall a position it apprehended the defendant would take. * * * The judgment of the District Court is reversed, with instructions to proceed in accordance with this opinion."

The decision in the instant case holds that the plaintiff established a prima facie case by showing ownership of the bonds, maturity, collections made by the village, demand for payment, and no payment. This statement is taken directly from point 8 of the foregoing opinion in the *Fidelity Trust Company* case where the statement was entirely correct since the village had made no payment on the plaintiff's bonds and the plaintiff had affirmatively proved by admissions of the village collector that cash had been received in payment of bills treated as paid with securities. The statement cannot be applied to the instant case in which the plaintiff's bonds had been paid down from $159,000 to $132,500 and no competent evidence was introduced to show cash collections beyond those of which the plaintiff received its share.

The instant decision then proceeds to create the "trust accounting" theory that all doubts must be resolved against a municipality which has failed to keep proper records and to explain the errors and omissions found therein. The Court of Appeals thus creates an "event" in which the limited liability of a municipality for cash actually collected can be converted into a general municipal liability, namely, in the event that the municipal officers fail to keep proper records and to explain the errors and omissions found therein.

This trust accounting theory is exactly contrary to the basic doctrine of the Illinois Local Improvement Act that

no bondholder "shall have any claim or lien upon the municipality in any event". It is exactly contrary to the decisions in all of the foregoing cases. It is, in particular, exactly contrary to the decision in the *Fidelity Trust Company* case in which the plaintiff was denied recovery on the securities transactions in which it did not affirmatively prove the receipt of cash by the village, even though the municipal records were a mass of errors and omissions far beyond anything chargeable to this petitioner.

The decision is also contrary to the *Fidelity Trust Company* case in that it fails to recognize that whatever duty there may have been to keep accurate accounts was the duty of the village collector. The established law that the municipality is not liable for the collector's default was recognized in the *Fidelity Trust Company* case with the following statement:

> "The village collector had been guilty of an illegal act but the village, for the collector's default, neglect or mistake in the performance of his duty, cannot be held liable."

Upon rendition of the Court of Appeals opinion counsel for the respondent was quoted in the press as saying: "The decision has far reaching significance, because for the first time a federal court has ruled that a municipality must keep accurate records of collections or be held responsible." The decision does indeed have far reaching significance. It vitiates the limitation in the Illinois statute that the bondholder shall have no claim or lien *in any event* except for cash actually collected. It overrules, while purporting to affirm, all the previous decisions of the Illinois courts and the federal courts. It opens the door to a threatened flood of litigation in federal courts against Illinois municipalities, a threat so definite that the Illinois Municipal League sought to intervene to have the decision modified.

II.

THE RESPONDENT'S TESTIMONY AND EXHIBITS WERE BASED ENTIRELY ON OPINION AND WERE INCOMPETENT UNDER THE "TRUST ACCOUNTING" OR ANY OTHER THEORY.

The Illinois Local Improvement Act permits the payment of special assessments by the surrender and cancellation of the special assessment bonds. Ill. Rev. Stat. 1951, Chap. 24, sec. 84-89. The petitioner's records show that 4,202 special assessment bills were paid with securities pursuant to this statute. The sole issue in the case is whether these bills were paid with securities or were paid with cash and the securities substituted as charged by the respondent.

The village collector died before the trial. The only other persons with direct knowledge of the manner in which the bills were paid were the property owners who made the payments. In a discussion as to their availability as witnesses counsel for the respondent said, "You can show 7,500 are available. I am going to call as many as this record will stand." (Tr. 474.) The respondent, however, failed to call any property owner as a witness. The respondent relied instead entirely upon the opinion evidence of Mr. Blunt. The following are examples of the type of testimony which he was permitted to give:

* * * * *

> Mr. Blunt: By examination of the books of original entry of the Village of Skokie.
>
> Mr. Lyon: I object to that as being a legal conclusion. I think he should describe the books and records rather than characterize them as the books of original entry. That is a matter of law.
>
> The Master: Overruled. (Tr. 284-5.)

* * * * *

Mr. Blunt: * * * as a result of our audit of the books of original entry and accounts of the Village of Skokie. * * *

Mr. Lyon: I move to strike the conclusion again as to the books of original entry. I will not make that objection each time if it may be understood that I object to it each time it is used in the record.

The Master: That will be understood and the ruling will be the same. Objection overruled. (Tr. 289.)

* * * * *

Mr. Blunt: This was an acceptable transaction because the name of the property owner was identifiable.

Mr. Lyon: I object to whether it is acceptable or not.

Mr. Short: It is acceptable to himself as an auditor.

Mr. Blunt: This transaction was acceptable to us.

The Master: By amending it I think it is all right. (Tr. 328.)

* * * * *

Mr. Blunt: In addition to that the elimination of $131,967.85 of improperly issued obligations set forth on page three and four of plaintiff's exhibit number 3.

Mr. Lyon: I move to strike out "improperly issued obligations" as being a legal conclusion.

Mr. Short: I think it is proper.

Mr. Lyon: It is not up to this witness to decide the law as to what is or is not a properly issued obligation.

Mr. Short: I think it is within his province to so state in reference to an exhibit the reasons why he treated certain items in certain ways.

The Master: Do you mean when you use the term "improperly issued obligations" that they were improperly issued according to your judgment?

Mr. Blunt: Yes, sir.

The Master: With that understanding he may answer. (Tr. 344-5.)

* * * * *

Mr. Blunt: * * * The issuance of a reissued bond in our opinion is not acceptable and is improper.

Mr. Lyon: I move to strike out that portion about the bond isn't acceptable and is improper.

The Master: He stated it is only his opinion.

Mr. Lyon: The witness hasn't any right to give an opinion on a question of law before the court for decision.

Mr. Short: That was in the preparation of his exhibit.

The Master: He simply answered a question as to what were reissued bonds and he stated his opinion only. (Tr. 345-6.)

* * * * *

Mr. Blunt: They are cancelled and they are no longer entitled to prorations.

Mr. Lyon: I move to strike out his conclusion that they are no longer entitled to prorations. * * * It is the opinion of the witness and not a statement of fact.

The Master: I will take it from an expert witness. He has the right to interpret and judge in the matter. (Tr. 386-7.)

* * * * *

The Master: * * * You can question him (Blunt) on what is an acceptable liquidation and what is not an acceptable liquidation. But he is an expert witness and he has the right to say whether in his judgment they are acceptable or not.

Mr. Lyon: I disagree with that. (Tr. 404.)

* * * * *

Mr. Blunt: There were quite a number of transactions where the wrong bond was applied to the wrong installment of the bill.

Mr. Lyon: I move to strike out the answer as being a legal conclusion by this witness.

Mr. Hampton: I join in that objection.

The Master: The objection will be overruled. The answer will remain in the record.

Mr. Short: Did that influence you in making your decision that in your opinion cash had been substituted for securities?

Mr. Lyon: I object to what influenced him in arriving at opinions. His job is to testify.

Mr. Short: Master, that was opened up in that manner on cross-examination. I contend that opens the door for me to explore it fully.

The Master: Well, as I remember in his explanation he stated that one fact entered into his conclusion.

Mr. Short: I don't recall that.

The Master: Let him answer if he can.

The Witness: That type of transaction wouldn't have influenced me with reference to treating these items as cash. That might have occurred as a result of an error by the Village Collector, but on the other hand, it might have been a deliberate attempt to use securities in trying to apply them to bills that were involved in so-called liquidation transactions. I cannot say what was the motivating reason.

Mr. Lyon: I move to strike out his answer as not being responsive as well as being immaterial.

Mr. Hampton: I join in the objection.

The Master: Objection overruled.

Mr. Short: Do you have an opinion as to whether or not any cash was paid to the Village Collector in this transaction of January 12, 1942 in connection with a redemption from forfeiture?

Mr. Blunt: Yes sir.

Mr. Short What is that opinion?

Mr. Lyon: I object to the question. The witness isn't entitled to give an opinion. He is entitled to testify to the facts as he found them from the records out there.

Mr. Short: Master, the question goes to this point. The foundation for this is his testimony that no record of the Village Collector showed any receipt of cash or anything on January 12, 1942, the date this receipt bears, which is really the earliest date shown on the duplicate original receipted tax bill. The Collector purports to have received a collection a year or so later, September, 1943. It is better than a year and a half later. Now, my question goes as to whether

he has an opinion if in this particular instance the Village Collector received any cash in 1942. He stated he has an opinion on that, and I would like to know what that opinion is.

Mr. Lyon: I object to him giving an opinion. If he found any facts let him testify on the facts, but not what his opinion is.

Mr. Short: He testified the Village Collector hasn't recorded any payment on the date that this receipt bears, even though the receipt itself says that he received that amount of money on January 12, 1942.

The Master: Well, any opinion he might express would have to be based on some facts which he determined from his examination, and whatever those facts are ought to be stated in connection with his opinion. Objection overruled. (Tr. 785.)

* * * * *

Mr. Blunt: For the purpose of simplification, we have computed interest at the rate of five per cent per annum on the funds which we have considered were unlawfully withheld. * * *

Mr. Lyon: I move to strike out all that part of the answer in which the witness presumes to decide what is and what is not an unlawful collection or an unlawful withholding.

Mr. Short: I think the witness has testified to what the plaintiff's contention is. We have been through that before.

The Master: The word "unlawful" will be a conclusion of the witness. (Tr. 849-850.)

* * * * *

Mr. Blunt: * * * The reallocation of such transactions would obviously be of no value in computing the interest on funds unlawfully withheld.

Mr. Lyon: I move to strike out so much of that answer as is what this witness believes to be unlawful.

Mr. Short: I think that is subject to the same ruling Your Honor made.

Mr. Lyon: The witness has no right to give any of his own beliefs as to what the law is. If the plaintiff wishes to make a contention of one sort or another

that is a matter for argument and not a matter for testimony by a witness.

The Master: The same ruling as before; wherever the word "unlawful" is used it will be considered as only the contention of the plaintiff in this case. (Tr. 851.)

* * * * *

Mr. Lyon: The question is, Mr. Blunt, whether that (column 5, exhibit A-2) agrees with the bonds as shown by the Village records to be outstanding. * * *

Mr. Blunt: No, it does not include other securities that are also issued and outstanding that are not subject to proration benefits.

Mr. Lyon: When you say it does not include other securities that are also issued and outstanding that are not subject to proration benefit, that is your conclusion, is it?

Mr. Blunt: Yes sir. That is my opinion. (Tr. 881-882.)

* * * * *

Mr. Wooster: I want to find out if your theory is the same on this (plaintiff's last exhibits) as the other one. You testified you were not there and you don't know whether they were paid in cash, but you assumed it. Is that a correct statement of your testimony on the first exhibit?

Mr. Blunt: I assumed that after an examination of the records.

Mr. Wooster: And are you continuing with the same assumption here?

Mr. Blunt: Yes sir. (Tr. 933.)

* * * * *

Mr. Blunt gave it as his *opinion* that all of the bills shown in the municipal records as paid with securities were first paid in cash and the securities later substituted, except in two transactions which were "acceptable" to him. Early in his testimony he admitted that he "resolved all presumptions, obscurities, and doubts adversely against" the village, which in his opinion was a trustee,

"and treated the amounts shown by the Village Collector's duplicate receipted tax bills as receipts of cash." (Tr. 338.)

The following portion of the transcript shows how completely Mr. Blunt's opinions were a matter of presumption and assumption:

> The Master: Do I understand from your answer to the question that Mr. Lyon asked that that sum excludes absolutely all collections where bonds were tendered?
>
> Mr. Blunt: No, it does not. It includes all such transactions.
>
> The Master: And you have treated the bonds, therefore, as cash, equivalent to cash?
>
> Mr. Blunt: We have treated the duplicate original receipted tax bills that are stamped "Paid" as though they were the equivalent of cash, or presumed that they were paid in cash except the two instances which we could identify.
>
> If I may explain, sir, the figures appearing in column 4 of plaintiff's exhibit number 2 are actually the total principal collections. It does not purport to be a historical account of any bonds which may have been cashed by any kind of a transaction. It is merely an accurate record of our analysis of the duplicate original receipted tax bills marked "Paid" by the Village Collector, plus the collections which the Village Treasurer received from the County Collector and the County Clerk.
>
> The Master: And not including the bonds where they were tendered?
>
> Mr. Short: Master, I don't like the word "tendered".
>
> The Master: Where they were tendered and accepted? You have two instances, you have testified, where that has been done?
>
> Mr. Blunt: Yes, sir.
>
> The Master: Would you say as to all other bond transactions where bonds have been tendered in payment of those assessments that there was not a legitimate transaction in any of the remaining bond trans-

actions? Couldn't there have been a re-collection by tender of bond not only in one instance but in numerous instances where the tax receipts or bills had both stamps on them so you could not tell from looking at the bill whether it was paid in bonds or paid in cash. You have assumed it in those instances each time that they were paid in cash?

Mr. Blunt: Yes, purely by presumption, on many so-called liquidation transactions it might have been possible for some property owner to legitimately tender a bond in payment of his special assessment bill, but those transactions are so commingled with other trust accounts that we are unable to identify which security is applicable to which property owner's bill. The bill is not marked to show or identify what security was used. Neither is the cancelled bond marked to show which bill that bond purportedly paid, and in the absence of responsible information out there to show that there were any other legitimate tender or acceptance of securities other than the two which I testified to, I considered them as cash transactions. I likewise observed identification between the bond and the property owner in the two transactions I testified to, and I presumed that it couldn't be anything other than an acceptable transaction. I think that was a presumption, but it was a reasonable presumption.

Mr. Blunt not only expressed his legal opinions in his oral testimony, but also set up the figures in his accounting under such headings as "Acceptable Liquidations", "Unacceptable Liquidations" and "Improperly Issued Obligations". (Pl. Ex. Bk. 18 & 20.) These headings obviously were not taken from the village records, but constituted classifications according to his opinion.

Mr. Blunt went far beyond the province of an accountant which is to examine complicated books and records and prepare by arithmetical computation and calculation the proper footings to figures involved.

The case of *Continental Casualty Co.* v. *First National Bank of Temple,* 116 F. 2nd 885, is in point. It was decided by the Court of Appeals for the fifth circuit, and certiorari denied by this Court. It involved the liability of the surety company upon alleged defalcations of a bonded employee of the bank. The plaintiff, as in the case at bar, relied upon the testimony of an accountant. He testified to his examination of the books and records and was permitted to state that in his opinion the assets of the bank were reduced by the amount of certain deposit slips withheld by the bonded employee. On appeal by the bonding company from judgment for the bank the judgment was reversed in an opinion which contains the following:

> "It is our view that the experts should have been restricted to giving testimony as to what was actually done in each instance as revealed by the records and to explaining any technical matter involved in banking or accounting. It should have been left to the jury to determine the ultimate question as to whether any of the assets of the bank had or had not been diminished in reaching the final conclusions as to the liability of the defendant. This is especially important where the claim is based upon charges of fraud and dishonesty, which are never presumed and which the plaintiff must establish by a fair preponderance of the evidence and not leave to mere speculation and guess."

In the case of *Smythe's Estate* v. *Evans,* 209 Ill. 376, 388, 70 N. E. 906, 911, the Court in discussing the competency of opinion evidence by an accountant said:

> "It is also proper, for the convenience of the jury, to take the evidence of a bookkeeper, accountant or other person skilled in the work of that character, to show the footing of a column of figures, or to show the result of any calculation from a complicated set of figures which cannot be readily carried in mind by the jury, where the calculation is purely mathematical.

> In making these figures from these books the only thing that it was proper to show by Flyton was the footings or other results obtained, in figures. His statement based upon his examination of the books, that the profits were a certain sum, is a conclusion, and inadmissible" * * *.

The Court of Appeals at page 8 of its opinion stresses the duty of the District Court under the Federal Rules of Civil Procedure to accept the master's findings of fact unless clearly erroneous. This is a misconception of what the District Court did. The figures in the master's report came entirely from the Blunt exhibits, dollar for dollar and penny for penny. The master did not make a single independent calculation. The respondent's whole case thus rests on the testimony given and the audit prepared by Mr. Blunt. The District Court held, not as a matter of fact, but as a matter of law, that neither the Blunt testimony nor his exhibits should have been admitted.

The question is not a matter of fact, dealing with the weight of testimony. The question is a matter of law, dealing with the competency of the only evidence to disprove the accuracy of the municipal records and to prove the fraud which the respondent charged.

This Court will examine into the competency of evidence as in the case of *McCandless* v. *United States*, 298 U. S. 342, in which this Court said:

> "* * * an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial."

The Blunt testimony and exhibits, even though the Court of Appeals could "perceive no infirmity" in them, were definitely incompetent and prejudicial to the petitioner.

III.

THE RELIEF SOUGHT BY THE PETITIONER'S CROSS APPEAL SHOULD HAVE BEEN GRANTED.

The authorities cited in the first point of this petition establish the rule that the limited liability of a municipality to pay special assessment bonds out of special assessment collections cannot be converted into a general liability except by affirmative proof that the collections have been made. The cases there cited show that a municipality cannot assume such a liability even by official action. It certainly follows that an "admission" by counsel, made at the first hearing before the accounts had been prepared, cannot create such liability if it does not in fact exist. *Village of Hartford* v. *First National Bank of Wood River*, 307 Ill. App. 447, 30 N. E. 2d 524.

The subsequent accounting of cash collections showed that the respondent had actually received more than its share. (Tr. 87-93 and Defts. Ex. Bk. 43.) The District Court judgment was therefore in error on this point and in the assessment of costs against the petitioner.

CONCLUSION.

The decision of the Court of Appeals in this case is contrary to the express terms of a statute which has been in force for over fifty years and contrary to every prior decision construing that statute. By the "trust accounting" theory the Court of Appeals has created an "event" in which a municipality can be held generally liable for money which it has not collected merely through the failure of the village officers to keep proper records and to explain any errors or omissions found therein. Every municipality in Illinois is vitally affected.

Even if the "trust accounting" theory were sound the decision is erroneous in that it is based solely upon opinion evidence by an accountant which is clearly incompetent.

We most earnestly urge that the Court grant its writ of certiorari in this case.

HENRY L. WELLS,
CHARLES C. WOOSTER,
EMMETT J. MCCARTHY,
JOSEPH J. WITRY,
GEORGE R. LYON,
Attorneys for the Petitioner,
Village of Skokie, Illinois.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—43-C-631) * *

MEMORANDUM.

While the rules do not require findings of fact or conclusions of law under the circumstances of this case, it may be helpful in the event of review to have the reasons underlying the rulings on the exceptions to the reports of the Special Master.

This suit involves a special assessment levied by the defendant Village pursuant to the Local improvement Act of the State of Illinois. The plaintiff owns bonds of this assessment. The assessment was divided into fifteen installments, payable from 1930 through 1944. No bonds were issued against the first and second installments. The bonds were payable out of the third through fifteenth installments.

In 1933 the plaintiff sued the defendant in this court on the same bonds now involved. The plaintiff claimed that it had not received its share of money collected, that the defendant had improperly applied receipts from the second installment to payment of the costs and vouchers normally payable out of the first installment, and that such receipts should have been used toward the payment of the bonds of the third through fifteenth installments, including the bonds of the plaintiff. By decree entered on January 10, 1934, this court held the plaintiff entitled to recover some six thousand dollars, but held that the plaintiff was not entitled to any judgment against the defendant by reason of the use of second installment receipts to pay the costs and vouchers normally payable out of the first installment. The Special Master in this case properly ruled that the 1934 decree was a bar to any further accounting for the period prior to its entry. The plaintiff's exceptions all go to this ruling.

It is uncontradicted in the present suit that the combined collections of principal in the first and second installments are insufficient to pay the costs and vouchers involved. The

prior decree constitutes an adjudication that the plaintiff has no right to the collections of the principal in the first and second installments until enough has been received to pay the costs and vouchers.

The defendant has presented an accurate accounting for all of its cash collections since the date of the 1934 decree. This accounting was prepared from the Village records of original entry. While it shows small amounts due the plaintiff in some installments, it shows over-payments in others which exceed the amounts due. The plaintiff, therefore, has no claim on the basis of the cash collections as shown by the Village records.

In addition to its cash collections the defendant's records treat 4202 bills of this assessment as having been paid or "liquidated" with securities pursuant to section 89 of the Local Improvement Act of the State of Illinois. With reference to these liquidation items the plaintiff charges "that the defendant collected large sums of money in cash in payment of special assessments, and caused or permitted a substitution of securities for such cash collections." The plaintiff concedes the legality of two liquidation transactions, but charges substitution of securities for cash as to all others. This charge is the principal issue of the case.

The same arose in the case of *Fidelity Trust Company* v. *Village of Stickney,* 129 Fed. 2nd 506. The evidence in that case showed the use of two methods in payment of special assessment bills. Special assessment bonds were first deposited with the Village collector by two "liquidators." By one method the liquidators authorized the Village collector to accept cash in less than the full amount of the bills. The Village collector received the cash, turned it over to the liquidators, and used the previously deposited bonds for payment of the bills. By the other method the liquidators themselves collected the cash and authorized the Village collector to use the previously deposited bonds for payment of the bills. The Court held the municipality liable for the cash which actually came into the hands of its officer under the first method of payment, but held that the municipality had no liability under the second method of payment. The record in that case shows that the plaintiff affirmatively proved the receipt of cash by admissions of the Village collector, who was called as a witness by the plaintiff, and also shows that the Village collector per-

mitted the deposit of bonds and the use of these bonds from time to time in payment of bills until the bonds were exhausted.

The accountant for the plaintiff in the present case testified that the defendant had accounted in totals of cash and securities for all bills shown paid, that there were a total of 24,350 bills, that he located all but one bill and was able to determine from the records the amount of the missing bill and the date of its payment, that the defendant treated 20,148 bills as paid in cash and 4,202 bills as paid by liquidation with securities, that he could determine the collections of principal and interest as of any given date and the present status as to unpaid bills. It is obvious from this testimony that the records of the defendant were entirely adequate, particularly when it is remembered that collections started in 1929.

The records of a municipality are prima facie correct. The charge that the defendant caused or permitted substitution of securities for cash not only imputes a failure of the municipal officials to perform their duties but imputes also the crime of embezzlement. The burden of sustaining this charge was on the plaintiff. The municipal officers and the surety on their bonds were originally parties defendant, but the village collector died before his testimony could be taken and the other officers and their surety were dismissed by the plaintiff.

Aside from the village collector, the persons who had direct knowledge of whether the bills were paid in cash or with securities were the property owners who paid the bills. Their names and addresses were on the bills. The plaintiff conceded that 7,500 of them were available, and counsel for the plaintiff announced that he would call "as many of them as this record will stand." Yet no property owner was ever called as a witness.

The plaintiff relies instead on the testimony of its accountant, who was permitted to testify that *in his opinion* the bills had been paid in cash and the securities later substituted. He likewise was permitted to express his opinion as to "acceptable liquidations," "unacceptable liquidations," "illegally issued securities" and other legal matters. Despite objections and motions to strike by the defendant, the Special Master held that the accountant was an expert witness and entitled to express his opinion.

The general rule as to the testimony which may be given

by an accountant is stated in *People* v. *Gerold*, 265 Ill. 448, as follows:

> "Where the originals consist of numerous documents, books, papers or records which cannot conveniently be examined in court and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any competent person who has examined the documents, provided the result is capable of being ascertained by calculation." p. 460.

The testimony given by the accountant for the plaintiff in this case was not capable of being ascertained by calculation, but it was admittedly presumption and opinion. Neither the opinion testimony given by this accountant nor the exhibits prepared by him should have been admitted in evidence. Without such opinion testimony and such exhibits the record is barren of any evidence which would sustain the plaintiff's burden of showing that the defendant received cash in payment of the bills which it treated in its records as having been paid with securities, and the findings of the Special Master to this effect are clearly erroneous.

At the hearing on January 17, 1945, counsel for the defendant admitted a liability of $5,000 to the plaintiff on its bonds. The plaintiff is entitled to judgment for this admitted liability.

By Count II of its Amended Complaint the plaintiff charges that the bills shown by the Village records to have been paid in securities were not properly paid and prays that such bills be reinstated on the books as unpaid. The theory of Count II is wholly contrary to the theory that the bills were paid in cash and the securities later substituted. The evidence does not support the allegations of Count II, and the relief prayed therein cannot be granted.

Igoe,
Judge, United States District Court.

Dated: March 8, 1950.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

October Term, 1950, April Session, 1951.

10,172	The First National Bank and Trust Company of Racine, *Plaintiff-Appellant*, *vs.* Village of Skokie, *Defendant-Appellee*.	Consolidated Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
10,206	The First National Bank and Trust Company of Racine, *Plaintiff-Appellee*, *vs.* Village of Skokie, *Defendant-Appellant*.	

June 27, 1951.

Before MAJOR, *Chief Judge*, KERNER and DUFFY, *Circuit Judges*.

DUFFY, *Circuit Judge*. The Village of Skokie, Illinois, (then known as Niles Center), provided by ordinance for the construction of a sewer system in said village pursuant to an Illinois statute entitled "An Act Concerning Local Improvements." The sewer project was known as Local Improvement 60610. Provision was made to levy a special assessment against certain designated real estate to pay for the cost of the sewer. Provision was also made for the issuance of special assessment bonds to anticipate the collection of such special assessments. Each bond, by the terms thereof, was payable from the collection of the installments to which it related. The bonds bore interest at the rate of 6% per annum, evidenced by interest coupons attached thereto. The interest was likewise payable only from the collection of interest on the installment to which the bond related.

The Special Assessment Roll was confirmed by the County Court on December 29, 1928, in the following amounts: first installment, $76,708.13; second to fifteenth installments, $73,906.55 each. The total assessment was $1,111,399.83. The first installment was due and payable on December 31, 1930, and the fifteenth installment on December 31, 1944.

The bonds issued were divided into Series 2 to 14 inclusive, Series 2 being used in anticipation of installment No. 3, and the bonds of Series 4 to 14 for the collection of the subsequent installments. Plaintiff is the owner of $159,000 in principal amount of said bonds, some being in each of Series 2 to 14 inclusive, except Series 4 and 5. The village had made certain payments to plaintiff, leaving a balance due of approximately $132,500, plus interest.

Count 1 of the amended complaint seeks, among other relief, an accounting, a money decree, and an injunction restraining commingling and diversion of funds. In the alternative, Count 2 asked for reinstatement on the village records of all illegally extinguished liens of Special Assessment 60610. On September 14, 1943, the district court ordered the Village of Skokie to render an accounting from January 10, 1934. On October 30, 1944, the court referred the cause to Hon. Warren H. Orr, a special master who, after extended hearings, filed a report containing detailed findings of fact and conclusions of law, pursuant to which he recommended that judgment be entered in favor of the plaintiff under Count 1 for $159,450.53, plus $21,244.57 costs, and $26,403.40 as master's fees and stenographic charges.

Defendant filed various objections to the master's report, all of which were sustained by the district court except one. The court overruled all of plaintiff's objections to said report, and directed that judgment be entered against the defendant in the sum of $5,000, with costs assessed equally, excluding $19,680.62 for auditor's fees, which were charged entirely against the plaintiff. The court dismissed Count 2 for want of equity.

At the first hearing before the master, counsel for defendant stated, "Well, in connection with making proof and simplifying it, I want to state for the record that the defendant admits that they owe the sum of $5,000.00 to the plaintiffs here and are ready to pay it. That is represented in their share of the collections made ap-

plicable to the bonds and coupons in question." The award of $5,000 to the plaintiff by the district court was based upon this concession.

The special master ruled that an accounting was necessary to determine whether $5,000 or a greater sum was due to plaintiff. At successive stages of the hearing defendant submitted three statements of account, all of which were found by the master to be incorrect and incomplete, and same were withdrawn by defendant. On April 3, 1946, the village asked for a continuance in order to prepare a correct statement. The master granted the continuance saying, "* * * this is the last continuance I will grant for this audit. * * * If they can't get a correct one in four audits, we cannot allow them to keep making other audits." The fourth audit was filed on June 5, 1946. The master found that this audit likewise was incomplete and unsatisfactory, and he then gave leave to plaintiff to re-open its case in order to have a complete audit prepared. This was done by Raymond S. Blunt, Sr., a certified public accountant of many years experience in municipal accounting, who had audited more than 2,000 special assessment funds.

The village prepared its tax bills in duplicate from the Assessment Record kept in the Special Assessment Roll and Land Lot Ledger. When a person paid his taxes, both the original and duplicate bill were stamped, "Received Payment," together with the date and the name of the village collector. Each receipted bill showed the amount paid, the installment paid, and the lot number on which the lien was being extinguished. In addition the assessment against each lot was stated, together with the dates to which the interest was computed, and the amount thereof.

The original receipted bill was given to the taxpayer, and the duplicate was retained by the village. This duplicate was the first record made in the collector's office of the payment of the tax it represented. The next record was the collector's daily deposit record to the treasurer's account, reflecting the transactions of that day. The third record was when the auditor posted the payment to the Special Assessment Roll or Land Lot Ledger. The fourth record was the monthly collector's report to the village treasurer. All information relative to collection of taxes by the village collector stemmed from the duplicate original receipted tax bills in his office.

There is substantial evidence to sustain the master's findings that after the filing of this lawsuit and prior to the time when Mr. Blunt began his audit, officials or employees of the defendant altered the Special Assessment Roll or Land Lot Ledger by stamping that record, "Paid with Village Securities"; also that the duplicate original receipted tax bills were altered by stamping upon them, "Paid with Village Securities." In making the audit, employees of Mr. Blunt searched the village vaults and finally assembled 24,350 duplicate original receipted tax bills. All of these were stamped with the words, "Received Payment," together with the date paid and the name of the village collector. The master found that 4,202 of said tax bills had been altered by the addition of the stamped phrase, "Paid with Village Securities." On a large number of the altered bills, in addition to the stamped date of payment, there was a pencilled date interlined above the stamped date. The pencil notation was always a later date than the stamped date, and the lapse of time between the two dates ranged from a few days to an extreme of more than four years.

The validity of the levy, the issuance of the bonds and interest coupons, and plaintiff's ownership of the bonds described in the complaint are not in issue. Furthermore, it is well established Illinois law that money collected by the officials of a municipality in payment of special assessments levied for municipal improvements constitutes a trust fund. *The People ex rel. Anderson* v. *Village of Bradley*, 367 Ill. 301; *Rothschild* v. *Village of Calumet Park*, 350 Ill. 330; *Flanagan* v. *City of Chicago*, 311 Ill. App. 135; *Viehweg* v. *City of Mt. Olive*, 298 Ill. App. 412. The critical questions are: Did the defendant village collect some of the assessments levied under Local Improvement 60610 in cash, and if so how much? It is admitted that plaintiff would be entitled to receive its proportionate share of any cash thus collected. *Fidelity Trust Co.* v. *Village of Stickney*, 7 Cir., 129 F. 2d 506.

The special master found that from January 11, 1934, to April 30, 1947, defendant had collected in cash for the benefit of bondholders of Special Assessment 60610, principal in the amount of $326,897.73 and $152,724.22 of interest; that such collections are applicable to bonds payable from the third to fifteenth installments inclusive; that the par value of bonds of Special Assessment 60610 still outstanding on April 30, 1947, entitled to a pro rata

share of said collections, was $508,300.00; and that accrued interest thereon from January 11, 1934, to April 30, 1947, was $349,612.23. After deducting sums theretofore paid to plaintiff, the special master computed that there was due to plaintiff on April 30, 1947, principal in the amount of $91,178.83 and $68,271.70 of interest, and recommended that a judgment against the defendant be entered for $159,450.53 and costs.

The district court held that the defendant village presented an accurate accounting for all of its cash collections since the date of the 1934 decree. However, we think the overwhelming weight of the evidence demonstrates the contrary to be true. We find ourselves in agreement with the findings of the special master: "The Collector's records and books in the Village of Skokie are a confused array of errors, corrections, omissions and substitutions, * * * certain actions of the defendant village officials * * * closely borders upon fraud."

The village treasurer's records of the 24,350 duplicate original receipted tax bills showed these transactions as cash receipts, yet 4,202 of them were altered by stamping them, "Paid with Village Securities." Many of these were additionally altered by the interlineation of a pencilled date above the stamped date. In all cases where the duplicate original receipted tax bills showed two dates the payment was reported by the collector on the later date. However, interest on each of said tax installments was computed only to the earlier date, showing payment probably was made then. The village records do not disclosed what happened to the collections made on the earlier dates.

Defendant's records treated $4,222.18 of principal collections and $3,294.44 of interest collections of the second installment as a liquidation transaction, by use of village securities, but this could not be true as no bonds had been issued in anticipation of the collection of the second installment.

Under Sec. 89 of the Cities and Villages Act, *Ch. 24, Sec. 795 of the 1933 Ill. Smith-Hurd Rev. Stats.*,

> "Any property owner may pay his assessment, wholly or in part, with the bonds or vouchers issued under this act on account of such assessment, applying, however, the bonds and vouchers of each series only to the payment of the installment to which they relate. * * * All vouchers and bonds received in payment

of such assessment shall be cancelled by the officer receiving the same, as of the date of their receipts, * * *."

Defendant's accounting showed that a large number of coupons from unrelated installments were received in payment of the interest on installments to which they were not applicable. It is apparent that they were not received upon the date when the original and duplicate original receipted tax bills were stamped, "Received Payment."

The evidence amply sustains the master's finding:

> "From the foregoing it appears that the alteration of the original records was made to conform to transactions within the Collector's office occurring after the date on which the collection was made. * * *"

The same is true as to the finding:

> "* * * In the four different audits and statements the Village, through its agents and officials, failed to set forth in any complete or understanding manner how much money it had actually collected. * * * It was only from the audit directed by the Special Master, after the four unsuccessful attempts of the Village to render a proper accounting, that an audit was produced at great expense by the plaintiff to show, as far as possible, what the Village officials had done or failed to do in the premises. * * *"

And also:

> "But the Collector failed to record in any other official record what he received in payment, whether cash or securities, and what he did with the payment. It does appear that the Village officials went back to the duplicate original receipted bills and altered them by interlineation with a pencil date above the stamped date of payment and did the same thing to the special assessment roll; and then on a subsequent date, from several days to as much as 4 years later, a report was made to the Treasurer that cash and securities had been received on the later date. * * *"

The Village of Skokie is and at all relevant times was the trustee of the funds resulting from collections under Special Assessment 60610, charged with all attending fiduciary duties, including the obligation to spread the

assessment, collect it and make disbursements authorized by law. *Fidelity Trust Co.* v. *Village of Stickney, supra,* p. 510; *Village of Brookfield* v. *Pentis,* 7 Cir., 101 F. 2d 516, 520; *Rothschild* v. *Village of Calumet Park, supra,* p. 341. It was the further duty of the Village of Skokie, as such trustee, to keep accurate accounts during the entire course of the trusteeship. *Wylie* v. *Bushnell,* 277 Ill. 484, 491; *Lehman* v. *Rothbarth,* 159 Ill. 270, 280.

The plaintiff established a prima facie case by showing ownership of the bonds, maturity, collections made by the village, demand for payment, and no payment. *Fidelity Trust Co.* v. *Village of Stickney, supra,* p. 511. The burden was then upon the village to explain what collections were made and what was done with them. *Fidelity Trust Co.* v. *Village of Stickney, supra,* p. 511.

It affirmatively appears that the Village of Skokie negligently failed to keep proper records, and to explain the errors and omissions found therein, with the result that all doubts must be resolved against it. *Fricke* v. *Weber,* 6 Cir., 145 F. 2d 737, 739. The rule in Illinois, as elsewhere, is stated in *Crimp* v. *First Union Trust Savings Bank,* 352 Ill. 93, 102:

> "* * * Where there has been a negligent failure to keep trust accounts all presumptions will be against the trustee upon a settlement, obscurities and doubts being resolved adversely to him. * * *"

The district court stated that Accountant Blunt's testimony together with the exhibits prepared by him from defendant's records were entitled to no weight as constituting both "presumption" and "opinion." By giving no weight to Blunt's testimony, the district court held the findings of the special master were not sustained by the evidence.

We perceive no infirmity in the Blunt testimony and exhibits, and are of the opinion that they were properly received in evidence by the special master. *United States* v. *Johnson,* 319 U. S. 503, 519; *United States* v. *Freeman,* 7 Cir., 167 F. 2d 786, 791; *United States* v. *Mortimer,* 2 Cir., 118 F. 2d 266, 269; *Augustine* v. *Bowles,* 9 Cir., 149 F. 2d 93, 96.

It was the duty of the district court to accept the master's findings of fact unless clearly erroneous. *Rule 53(e)(2), Federal Rules of Civil Procedure.* The master saw and heard the witnesses. He lived with this case for al-

most four years. He gave the defendant every reasonable opportunity to explain its confused, inaccurate and altered records. The findings of the master are not clearly erroneous; it is our opinion that they are correct, and that the defendant's objections to the master's report should have been overruled, and judgment entered in favor of the plaintiff in the sum of $159,450.53, plus costs.

We think it was an abuse of discretion to disallow the fees of the Blunt audit as an item of plaintiff's costs, and to include as items of costs to be borne by the plaintiff, one-half of the fees and expenses of the special master and one-half of the charge of the court reporter. In our opinion the full amount of such items should be assessed as costs in favor of the plaintiff and against the defendant, less such credits thereon as defendant may have paid. The Blunt audit and the other expenses were made necessary in large part by reason of the confused and inadequate condition of the defendant's records. The situation presented is an appropriate one for the exercise of the "power of federal courts in equity suits to allow counsel fees and other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute." *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 164. The allowance to the plaintiff in this case of the expenses involved in the audit and the master's fees and disbursements, plus the charge of the court reporter, is dictated "for dominating reasons of justice." *Sprague* v. *Ticonic National Bank*, *supra*, p. 167.

Plaintiff also appealed from the determination by the master, sustained by the district court, that the accounting should not be computed for any period prior to January 10, 1934. In Cause No. 13,388 in Chancery in the United States District Court for the Northern District of Illinois, plaintiff herein was one of the plaintiffs who sued the defendant, who is the defendant herein, on the basis of its ownership of some of the bonds and interest coupons described in the complaint in the case at bar. A judgment in plaintiff's favor was entered on January 10, 1934, for $6,242.80 and costs. In computing the amount due to the plaintiff in the present case, the special master included only sums collected after the date of the former judgment.

Plaintiff argues that the Blunt accounting showed that a much larger sum than $6,242.80 was due it on January

10, 1934, and that plaintiff should not be bound by the judgment entered on that date because the decree was procured by fraud. However, we think the judgment of January 10, 1934, is *res judicata* and that the record does not disclose such fraud on or before that date as will relieve plaintiff from the bar of that judgment. As far as can be ascertained from the record before us, the alteration of the village records referred to occurred after that date. The district court was, therefore, correct in sustaining the master in limiting recovery to sums collected by the village after January 10, 1934.

In Appeal No. 10206, defendant appeals from the judgment of $5,000 which the district court awarded to the plaintiff, based on the concession made by defendant's counsel at the opening hearing before the master. In as much as the defendant's liability to plaintiff has been determined by the special master upon the basis of an accounting, and such basis and the amount of liability are approved by this court, the judgment for $5,000 must be vacated and set aside. In view of our disposition of the entire controversy, we do not pass upon the contentions presented with respect to this phase of the litigation. We likewise do not reach the issues raised by the allegations of Count 2 of the complaint which was pleaded in the alternative.

The judgment of the district court is reversed and remanded with directions to enter judgment consistent with this opinion, plaintiff to recover its costs in this court.

REVERSED.

76

FILED
DEC 26 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 452

THE VILLAGE OF SKOKIE, ILLINOIS,
Petitioner,

vs.

THE FIRST NATIONAL BANK AND TRUST COMPANY, OF RACINE, WISCONSIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HOWARD A. BRUNDAGE,
CHARLES F. SHORT, JR.,
Attorneys for Respondent, The First National Bank and Trust Company of Racine, Wisconsin.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

Statement 1

The Questions Presented Do Not Reflect the Issues of This Case 2

The Reasons Relied Upon for Allowance of the Writ Are Insufficient 3

List of Authorities Cited.

Armstrong v. Chicago & Western I. R. Co., 263 Ill. App. 126 (1931) 12

Augustine v. Bowles, 149 F. 2d 93 (C. C. A. 9, 1945) .. 10

City of Jacksonville v. Bankers Life, 90 F. 2d 141 (C. C. A. 7, 1937) 3

Continental Casualty Co. v. First National Bank of Temple, 116 F. 2d 885 (1941) 14

Doggett v. Greene, 163 Ill. App. 369 (1911) 12

Fidelity Trust Co. v. Village of Stickney, 129 F. 2d 506 (1942) 5

Friedman v. City of Chicago, 374 Ill. 545 (1940) .3, 19, 20, 21

Greenleaf's Lessee v. Birth, 30 U. S. 132, 8 L. Ed. 72 (1831) 12

Morton & Co. v. Zwierzykowski, 192 Ill. 328 (1901) 12

Murray v. Village of Skokie, 379 Ill. 112 (1942) 20

Northern Pacific Ry. Co. v. Keyes, 91 F. 47 (C. C. N. D., 1898) 10

People v. Gerold, 265 Ill. 448 (1914) 3, 14

People v. Village of Bradley, 367 Ill. 301 (1937)..... 5
Rollins v. Bd. of Com'rs. of Rio Grande County, 90 F. 575 (C. C. A. 8, 1898)..... 10
Rothschild v. Village of Calumet Park, 350 Ill. 330 (1932) 2, 3
Smythe's Estate v. Evans, 209 Ill. 376 (1904)..... 14
United States v. Freeman, 167 F. 2d 786 (C. C. A. 7, 1948) 10
United States v. Johnson, 319 U. S. 503 (1943), 63 S. Ct. 1233 .....3, 14, 15, 16
United States v. Johnson, 123 F. 2d 111 (C. C. A. 7, 1941) 16
United States v. Mortimer, 118 F. 2d 266 (C. C. A. 2, 1941) 10
Village of Brookfield v. Pentis, 101 F. 2d 516 (C. C. A. 7, 1939) 3
Village of Dolton v. Harms, 327 Ill. App. 107 (1945)... 3
Title 28, U. S. C., Section 1732..... 10
Rule 43 (a) Federal Rules of Civil Procedure..... 16
Rule 53 (d) (3) Federal Rules of Civil Procedure.... 17
Section 89, Cities and Villages Act, Chapter 24; Sec. 795 of the 1933 Ill. Smith-Hurd Rev. Stat. 21
IV Wigmore (3d ed.), Section 1230 (1940)..... 10

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 452.

THE VILLAGE OF SKOKIE, ILLINOIS,
Petitioner,

vs.

THE FIRST NATIONAL BANK AND TRUST COMPANY, OF RACINE, WISCONSIN,
Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT.

The summary statements submitted by petitioner in its petition for a writ of certiorari seek by skeletal presentation of the proceedings before the Special Master and by faulty analysis of the opinion of the Court of Appeals, to create a receptive climate for its arguments. The basic issue in this case, as was stated by the Court of Appeals, is "Did the defendant Village collect some of the assessments levied under local improvement No. 60610 in cash, and if so, how much?" (Tr. 1186.) The Special Master found that petitioner had collected cash for the benefit of bondholders and computed the amount due to respondent as its pro rata share of these collections. The Court of Appeals found that there was ample evidence to sustain the findings of the Special Master and that they were not clearly erroneous.

THE BASIS USED FOR JURISDICTION IN THIS COURT IS ERRONEOUS.

The basic issue in this case having been decided by the Special Master, the Court of Appeals had to determine whether or not the findings of the Master were clearly erroneous. There is no question before this Court as to a conflict with local law. Excerpts from the leading case in Illinois clearly demonstrate that where cash has been collected on a special assessment, the municipality is liable if it does not pay the bondholders. *Rothschild* v. *Village of Calumet Park,* 350 Ill. 330, 341:

> "The suit is brought to enforce its liability as trustee, to pay to the holders of the bonds the money which it received for that purpose, and it is the same, in effect, as an action of *assumpsit* for money had and received. * * * It is true that the Local Improvement act furnishes a complete code of procedure for the construction of local improvements by special assessment, from the initiation of the improvement to its completion and the collection of the money for its payment, but when the municipality which has made the improvement and collected the money to pay the bonds used in its construction fails in its duty to pay the bondholders, the latter may enforce their rights in accordance with the rules which prevail in other cases where money has been received to the use of another and retained without his knowledge.
>
> "* * * When the defendant in error had shown that the village collected the money applicable to the payment of his bonds and had not paid them, he had met the burden imposed upon him and was entitled to judgment unless the plaintiff in error showed a valid defense."

THE QUESTIONS PRESENTED DO NOT REFLECT THE ISSUES OF THIS CASE.

1. The Court of Appeals did not create a "trust accounting" theory of municipal liability. In the State of Illinois a municipality is a trustee to collect and distribute special assessment funds. *Village of Brookfield* v. *Pentis,* 101 F. 2d 516, 520 (C. C. A. 7, 1939); *City of Jacksonville* v. *Bankers Life,* 90 F. 2d 141, 143 (C. C. A. 7, 1937); *Rothschild* v. *Village of Calumet Park,* 350 Ill. 330 (1932); *Village of Dolton* v. *Harms,* 327 Ill. App. 107 (1945); *Friedman* v. *City of Chicago,* 374 Ill. 545 (1940). This was, and is the law in the State of Illinois, regardless of how long and earnestly the defendant may urge to the contrary.

The Court of Appeals did not hold that a municipality may incur general liability on special assessment bonds without affirmative proof of collections. On the contrary, the Court of Appeals agreed with the findings of the Special Master, that the petitioner had collected certain sums of money on the special assessment from which the respondent's bonds were payable, and that the petitioner was, accordingly, liable to the respondent for its proportionate share of those collections (Tr. 1190, 1191).

2. Neither the Special Master nor the Court of Appeals based petitioner's liability on "purely opinion evidence." But even were such the case, there would be no infirmity in the decision, as the applicable evidentiary rules authorize the introduction of opinion evidence in cases such as the one at bar. *United States* v. *Johnson,* 319 U. S. 503 (1943), 63 S. Ct. 1233; *People* v. *Gerold,* 265 Ill. 448 (1914).

3. The third question raised by the petitioner is entirely frivolous and does not require an answer.

THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT ARE INSUFFICIENT.

I.

The first reason presented by the petitioner misrepresents the opinion of the Court of Appeals and is phrased in terms calculated to mislead as to the issues actually decided by that Court. The Court of Appeals distilled the competing claims into this essence: "The critical questions are—did the defendant village collect some of the assessments levied under Local Improvement 60610 in cash, and if so, how much?" (Tr. 1186.) Answering this question in the affirmative, the Court of Appeals found that liability attached from the plain wording of the Illinois Local Improvement Act.

The first reason assigned by the petitioner contains this statement:

> "The decision in this case through the 'trust accounting' theory casts the burden of disproving collections on the municipality * * *."

This is a willful distortion of the plain language of the Court of Appeals which held that after collections had been proved,

> "* * * The burden was then upon the village to explain what collections were made and what was done with them." (Pet. Br. p. 43.)

At the risk of tedious repetition, we must again state that the Special Master found that the petitioner had collected certain sums in cash in payment of the special assessment from which the respondent's bonds were payable, and that it was entitled to its pro rata share thereof. The Court of Appeals held that his findings were not clearly erroneous,

but on the contrary amply supported by the evidence. In the case of *Fidelity Trust Co.* v. *Village of Stickney*, 129 F. 2d 506 (1942), to which the petitioner devotes roughly seven pages of its brief, the evidence discloses that the Village of Stickney had *not* collected certain portions of the special assessment. The Court of Appeals found that as to those funds which had never come into the possession of the Village it incurred no liability. Further discussion should be unnecessary. In the case at bar cash was affirmatively found to have been collected.

Emphasis is also placed on a statement, torn from context, to the effect that the Village would not be held liable for the default, neglect, or mistake of its agents. Where affirmative proof establishes that no trust fund is in existence, the statement is applicable. Under the circumstances of the instant case, where the findings are consistent only with the existence of the trust *res*, the statement has no relevance. One need look no further for authority than the same case from which the statement is taken; on page 510 of that opinion, the Court had this to say:

> "It seems clear to us that under the so-called first method by which money was collected by the collector of the Village, the Village is liable for the amount of money the collector received. This constituted a trust fund, for the integrity of which the Village was unquestionably liable."

The liability of a village or municipality is not dependent on neglect or misfeasance of its officers or agents but on the existence of the trust fund. In *People* v. *Village of Bradley*, 367 Ill. 301 (1937), the claimants were those who had installed the improvements. In the normal course of events such claims may only be satisfied from special assessment funds. The court there explained, pages 306, 307:

> "As the situation existed at the inception of the contracts between the contractor, subcontractors and the

> village, the liability was limited to the funds collected from the special assessment levied. The change in positions of the parties has been brought about by the default and misfeasance, if not malfeasance, of the village, acting through its governmental officials * * *. The money collected by the village from the special assessment levied to pay the cost of the improvement constituted a trust fund available to those having legal claims for materials furnished, or labor performed, in the course of construction of the sewer. * * * The law will not countenance the evasion by a village of its debt, by either its willful or negligent failure to apply towards the discharge of that obligation funds collected by it for the specific purpose of meeting such demand. * * *
>
> "We are not impressed with the argument that the village treasurer and not the village is the trustee of the funds."

Not only was the opinion of the Court of Appeals in full accord with local law, but it is impossible to discern how the holding could have been otherwise. Far from establishing the probability of conflict with applicable precedent, cases cited by the petitioner serve only to strengthen the position taken by the Court of Appeals. The fallacy of petitioner's argument is readily seen, for if the burden of explanation were placed on the trust beneficiary, a premium would then be placed upon the failure of a trustee to keep accurate records, or indeed, to keep any records at all.

II.

The second reason presented by the petitioner for allowance of the writ contains the unwarranted assumption that the judgment in the instant case was dependent only on opinion evidence. The District Court on September 14, 1943, ordered the petitioner to render an accounting. The Village attempted to evade this by stating, through its

counsel, that it owed the respondent $5,000.00 as its proportionate share of collections which were applicable to the bonds and coupons in question. The Special Master ruled that an accounting was still necessary in order to determine whether $5,000.00 or a greater sum was due to the respondent. After four successive statements of account made by the petitioner were found to be incomplete and inaccurate, the respondent was given leave to have a complete audit of all books and records in the Village relating to the special assessment in question.

The auditor employed by the respondent was Raymond S. Blunt, a certified public accountant and a member of the American Institute of Accountants, the Illinois Society of Certified Public Accountants, the Legislative Committee of Illinois, and of the Governmental Accounting Committee of the Illinois Society. He has had wide experience in municipal and governmental accounting, having examined the books and records of a number of counties and villages. He has audited more than 2,000 special assessment funds (Tr. 270, 271). He made an audit of the special assessment records on Special Assessment 60610 of the Village of Skokie commencing on March 18, 1947. He described his preliminary studies and the qualifications of the accountants he had assigned to assist him (Tr. 272). He was in control of all details of the audit procedure and in close contact with the work (Tr. 273). He examined the records of original entry including the 24,350 duplicate original receipted tax bills which were the first records made in the Collector's office of the payment of taxes; (Tr. 179, 180) he examined reports of the county collector and reports of the county clerk; he examined cancelled checks, cancelled vouchers, cancelled bonds and cancelled coupons (Tr. 275). He stated with infinite detail the method by which the audit was made (Tr. 275-279). Mr. Blunt first described respondent's Exhibit 1 of September

10, 1947 (Pl. Ex. Bk., p. 4) and explained the source of each computation shown thereon (Tr. 281-286). Respondent's Exhibit 2 of September 10, 1947 (Pl. Ex. Bk., p. 6) was likewise prepared by him, described, and the source of each calculation carefully related (Tr. 286-290).

Respondent's Exhibit 3 of September 10, 1947 (Pl. Ex. Bk., p. 11) is a summarized statement of all fund transactions from January 1, 1929 to April 30, 1947, resulting from his audit and examination of the books and records of the petitioner pertaining to Special Assessment No. 60610. Each page and heading of this exhibit, as well as the sources from which it was prepared is exhaustively described on pages 290 through 303 of the Transcript of Record. Mr. Blunt then stated that in preparing Respondent's Exhibit 2 of September 10, 1947 (Pl. Ex. Bk., p. 6) he used the information contained in respondent's Exhibit 3 of that date; in the preparation of said Exhibits 2 and 3, he used the entire assessment fund without breaking it down as to individual bonds in the schedules shown on these exhibits, so that they are based upon installment totals. In the preparation of respondent's Exhibit 1 of September 10, 1947, he took the information shown on respondent's Exhibit No. 3 as to totals and the summarization shown on respondent's Exhibit No. 2 and broke that down as to the individual bonds owned by the respondent in this case.

Due to a ruling of the Special Master that the respondent was barred by a former decree from recovering for any collections made prior to January 10, 1934, Mr. Blunt had to prepare other exhibits reflecting analyses of the records of the petitioner from January 10, 1934 to April 30, 1947. Respondent's Exhibit A (Pl. Ex. Bk., p. 22) is an analysis of the principal collections of this assessment from January 10, 1934 to April 30, 1947, which was prepared from the duplicate original receipted tax bills in the same manner except for the dates as respondent's Exhibits 1 and 2 of

September 10, 1947 (Pl. Ex. Bk., pp. 4, 6). Respondent's Exhibit B1 (Pl. Ex. Bk., p. 24) is an analysis of the interest collections for this assessment from January 10, 1934 to April 30, 1947, prepared from the duplicate original receipted tax bills and other Village records in the same manner as respondent's Exhibit 2 of September 10, 1947 (Pl. Ex. Bk., p. 6), except for the period covered.

Respondent's Exhibit B2 (Pl. Ex. Bk. p. 27) is a statement of the amounts claimed to be due the respondent in this case for interest collections made by the petitioner on this assessment from January 10, 1934 to April 30, 1947, and the method of computation conforms to the interest computations appearing on respondent's Exhibit 1 of September 10, 1947 (Pl. Ex. Bk. p. 4). Respondent's Exhibit C (Pl. Ex. Bk. p. 28) sets forth the amounts claimed to be due the respondent for principal, interest and interest on funds claimed to have been unlawfully withheld by the petitioner from January 10, 1934 to April 30, 1947. It was prepared from records of the petitioner for the purpose of setting forth as to each of the respondent's bonds the amounts due for principal, interest and interest on funds considered to have been unlawfully withheld. It consists of five pages (Tr. 1016 to 1017). The Master admitted respondent's Exhibits A, B1, B2 and C into evidence (Tr. 1037).

It is difficult to visualize a more thorough and complete foundation for exhibits than was given by the witness, Mr. Blunt. He identified each line of each exhibit, described what it represented and the source from which it was prepared. In each instance the basic foundation of these exhibits was the 24,350 duplicate original receipted tax bills which were the first record of collections made by the petitioner. In the instances where Mr. Blunt obtained his information from other Village records, he thoroughly described them and demonstrated that he had checked the

information against the original source, such as the duplicate original receipted tax bills (Plaintiff's Mass Exhibit 1). As was stated by the Master:

> "In all material respects the statements reported by Raymond S. Blunt, Sr. in connection with his audit of the Village records have not been contradicted or proven wrong by any evidence produced by the Village, although he was subjected to severe and exhaustive cross examination." (Tr. 1100.)

It is well settled that tabulations of voluminous documents in the form of schedules or summaries may be introduced for the aid of the court. *Augustine* v. *Bowles,* 149 F. 2d 93, 96 (C. C. A. 9, 1945); *Northern Pacific Ry. Co.* v. *Keyes,* 91 F. 47, 58 (C. C. N. D., 1898); *Rollins* v. *Bd. of Com'rs. of Rio Grande County,* 90 F. 575, 583 (C. C. A. 8, 1898); IV Wigmore (3d ed.) Section 1230 (1940). Section 1732 of Title 28 U. S. C. provides that writings and records made in the regular course of business are admissible in evidence in any court of the United States. This rule has been interpreted in *United States* v. *Freeman,* 167 F. 2d 786, (C. C. A. 7, 1948), as being applicable to the admission in evidence of statements prepared by an auditor from corporate records. To like effect is *United States* v. *Mortimer,* 118 F. 2d 266, 270, (C. C. A. 2, 1941).

This audit and the Exhibits herein described formed the basis for the Master's findings as to amounts collected, and thus due respondent.

As to the so-called opinion testimony, petitioner complains that Mr. Blunt stated that all of the bills shown in the Municipal records were first paid in cash and securities later substituted. Petitioner fails to inform this Court that this statement was adduced on cross-examination by its own counsel without objection or motion to strike the answers elicited.

Cross-Examination by Mr. Lyon.

(Counsel for Petitioner) (Tr. 372).

"Q. Do you wish to be understood as saying that all bills which bore the stamp 'Paid' were actually paid with cash?

A. I believe they were paid with cash, yes, sir. I believe securities were substitued after there was a payment of cash by the property owner.

Q. Would you say that was true on all bills?

A. I believe it was, sir.

Q. That includes those which you have classified as acceptable liquidations?

A. No, sir. In that case I don't believe it would. There were two such instances in which we found supporting evidence to indicate that the bill was paid with something other than cash."

On redirect examination of Mr. Blunt, following the above quoted extracts from the cross-examination, he was asked (Tr. 460):

"Q. Mr. Blunt, in cross-examination, I believe, in response to a question by Mr. Lyon you testified that it was your opinion that securities had been substituted for cash paid on these duplicate original receipted tax bills. Is that correct?

A. Yes, sir.

Q. Will you please explain your answer to the Court, please, and tell us on what you predicate that opinion?

Mr. Lyon: I object to that. The opinion was not an opinion to begin with, and on what he predicated the opinion is not a proper part of the record.

Mr. Short: Master, he opened up the question on cross-examination. I have a right, I believe, on redirect to answer that by further testimony in that regard.

The Master: Let him answer."

Whether it be fact or opinion of an expert, it is indisputable from the record that no objections or motions to

strike were made by petitioner's counsel when he chose to cross-examine on this subject matter. Although the cases uniformly authorize an expert witness to express an opinion on a subject matter within the province of expert testimony, that point was not before the trial court as this evidence was adduced by the petitioner and was not followed by a motion to strike. As was said in *Armstrong* v. *Chicago & Western I. R. Co.*, 263 Ill. App. 126 (1931), at page 144:

> "The rule on this question is that if one of the parties opens the way for the testimony objected to, there is no error in the admission of such evidence."

Again in *Doggett* v. *Greene*, 163 Ill. App. 369 (1911), at 378:

> "We are not convinced that the admission of this testimony was reversible error, nor that it did not fall within the principle stated by Greenleaf (vol. 1, sec. 468) and quoted by counsel, that 'If counsel chooses to cross-examine a witness as to facts which were not admissible in evidence, the other party has a right to examine him as to the evidence thus given.' "

To like effect are *Morton & Co.* v. *Zwierzykowski*, 192 Ill. 328 (1901), 332; *Greenleaf's Lessee* v. *Birth*, 30 U. S. 132, 137, 8 L. Ed. 72, 74 (1831).

It seems rather unusual for this petitioner to seek a reversal of the Court of Appeals' judgment because of a statement obtained by its counsel on cross-examination. Petitioner's counsel argued before the Master that this statement was not an opinion and yet now urge that it should have been excluded on the grounds that it was. The accuracy of this statement by Mr. Blunt was not challenged by any evidence of the petitioner.

Further criticism is made by petitioner of the use by Mr. Blunt of such phrases as "acceptable liquidations," "unacceptable liquidations," and "improperly issued ob-

ligations." The first instance of the use of the phrase "acceptable transaction" occurred on page 328 of the Transcript of Record:

> "Mr. Blunt: * * * This was an acceptable transaction because the name of the property owner was identifiable.
>
> Mr. Lyon: I object to whether it is acceptable or not.
>
> Mr. Short: It is acceptable to himself as an auditor.
>
> The Witness: This transaction was acceptable to us.
>
> The Master: By amending it, I think it is all right."

Following this amendment, no objection or motion to strike was made by petitioner's counsel. Mr. Blunt then used the word "determine" in an explanation (Tr. 329, 330):

> "Mr. Blunt: * * * we determined by such procedures that those bills were paid in cash and our report treats them as paid by cash.
>
> Mr. Wooster: I object to the conclusion of the word determined in there. How he treated it is all all right, but he determined that they were cash is objectionable.
>
> Mr. Short: I think that only goes to the weight. This is an expert witness.
>
> The Master: I understand the witness to mean when he says the word 'determined' that he is referring to his own work as an auditor. He classified them as cash.
>
> Mr. Wooster: With that understanding, I have no objection."

Again at Tr. 345:

> "The Master: Q. Do you mean when you used the term 'improperly issued obligation' that they were improperly issued according to your judgment?
>
> The Witness: A. Yes, sir.
>
> The Master: With that understanding, he may answer."

So once again we see that counsel for the petitioner, in this instance Mr. Wooster, had no objection after the witness explained that these phrases were used as a system of classification to describe how he treated the items in preparing his audit.

The cases cited by the petitioner as supporting its proposition that the admission of the Blunt testimony was in error do no such thing. Both cases involved jury trials wherein the question of fact to be decided was withdrawn from the jury by the expert's conclusion. Neither case approaches any factual similarity with the case at bar. In addition *Continental Casualty Co.* v. *First National Bank of Temple,* 116 F. 2d, 885 was decided in 1941, two years before this Court pronounced the rule in *United States* v. *Johnson,* 319 U. S. 503. *Smythe's Estate* v. *Evans,* 209 Ill. 376, was decided in 1904, but the Supreme Court of Illinois, in an opinion filed ten years later upon a factual situation comparable to that of the instant case, declared the Illinois rule in a manner strikingly similar to this Court's decision in *United States* v. *Johnson,* 319 U. S. 503. This was the case of *People* v. *Gerold,* 265 Ill. 448. It was a criminal prosecution of the City Treasurer of East St. Louis, Illinois, wherein *Gerold* was charged with taking credit for paying special assessment bonds and coupons after they had in actuality been taken up by his predecessor in office. An expert accountant, while on the witness stand, stated his method of reporting his conclusions from an examination of the books of the City, as follows (p. 459):

> "* * * I may state that the audit of bonds and coupons was based on the total amount of bonds authorized, which also showed payments of coupons that were *legitimately* issued. We also took into account the cash account that showed balances of unissued bonds. At that time we knew the amounts redeemed and the

> amounts outstanding, and we had the same information in respect to coupons, and the result of our examination *was that amounts had been paid in excess of the amounts issued and showed as redeemed.*" (Italics supplied.)

It is submitted that the accountant's statement of his result in that case is virtually the same as that of Mr. Blunt in the instant case. The Supreme Court of Illinois, on page 460 states:

> "Their principal objection is that the expert should not have been permitted to testify to his conclusions. Without discussing at length the various objections raised by counsel for plaintiff in error as to the admissibility of Ambrose's (the expert accountant) testimony, we deem it sufficient to say that we find no reversible error in the various rulings of the trial court on this particular subject. The weight of the testimony introduced by the State for the purpose of supporting the allegations under these twenty-six separate counts or liens, was a question for the jury." (Paraphrasing supplied.)

In *United States* v. *Johnson,* 319 U. S. 503 (1943), 63 S. Ct. 1233, *Johnson* had been indicted and convicted of defrauding the Government of income tax. An accountant testifying as an expert witness for the Government was permitted to give his conclusions as to *Johnson's* income. The question was whether the expert accountant had improperly testified on the "controverted" issue of the case. The witness was permitted to testify as to his computations of the gross income of *Johnson* for the year 1936. (Blunt, in the case at bar, was permitted to testify as to his computations of the gross receipts in cash by the petitioner as shown by the duplicate original receipts.) The witness in the *Johnson* case was permitted to testify as to his computation of the amount of tax still due the United States for the year 1936. (Blunt was permitted to

testify from his computations as to the amounts due respondent on its bonds calculated from the gross receipts.) The witness in the *Johnson* case had made these computations from the Government's Exhibits in evidence. (Blunt prepared his computations from the duplicate original receipted tax bills in evidence and other Village records.) (See *United States* v. *Johnson,* 123 F. 2d 111, 126, 127 (CCA 7, 1941.) This Court stated at page 519 that the effect of this testimony was not to withdraw any issue from the jury, nor was the correctness or credibility of any materials underlying the expert's answers even remotely foreclosed by his testimony. The same situation is present in the case at bar. All of the facts on which the expert Blunt's testimony was based were presented to the Special Master; all of the duplicate original receipted tax bills are in evidence; all of the books and records of the petitioner were available for use by it in the extensive cross examination its counsel made of this witness. This contention of petitioner is not only erroneous but expresses a concept already condemned by this Court in *United States* v. *Johnson,* 319 U. S. 503, 63 S. Ct. 1233 at 1240:

> "To require more meticulous proof than this record discloses that there were unreported profits from an elaborately concealed illegal business, would be tantamount to holding that skillful concealment is an invincible barrier to proof."

It is respectfully submitted that the test in a criminal case before a jury is far more strict than in a trial before a Master in Chancery conducting an examination within the purview of the Federal Rules of Civil Procedure.

Rule 43 (a) of the Rules of Civil Procedure for the United States District Court provides:

> "* * * In any case, the statute or rule which favors the reception of the evidence governs, and the evi-

dence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

Rule 53 (d) (3) provides:

"Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the from of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs."

The Special Master's own statement in his Amended Report, discloses that he exercised the authority given him by the above rules, and directed the accounting in question: Tr. 1112:

"It was only from the audit directed by the Special Master, after the four unsuccessful and incomplete attempts of the Village to render a proper accounting that an audit was produced at great expense by the plaintiff to show, as far as possible, what the Village officials had done or failed to do in the premises."

In order to refute petitioner's bald misstatement that the only evidence in this record was opinion evidence of respondent's auditor, it is only necessary to summarize the instances in which petitioner's witnesses have agreed with the testimony of Mr. Blunt. Undeniably conclusive is the fact that the Village Treasurer's records of the 24,350 duplicate original receipted tax bills showed these transactions as cash receipts (Tr. 331).

The Village auditor admitted that the duplicate original

receipted tax bills were the first record of any collections of special assessments in the Village (Tr. 180).

Early in the hearings before the Special Master, petitioner was caught altering the Special Assessment Roll by adding the stamp "Paid with Village Securities." No testimony was offered to explain this, but petitioner's counsel stated that there had been no tampering with the original records, and that the alteration of the Special Assessment Roll was an attempt to make it conform with the duplicate original receipted tax bills, which are the original records (Tr. 34, 35, 39, 40). Mr. Blunt, respondent's auditor, having been informed of this alteration, indicated that perhaps the duplicate original receipted tax bills had likewise been altered (Tr. 463). This suspicion was borne out at the hearing of December 3, 1947, when petitioner's own witness, Mr. Chamberlain, on both direct and cross-examination, stated that the duplicate original receipted tax bills had been stamped "Paid with Village Securities" after the beginning of the litigation (Tr. 609, 632). In other words, the duplicate original receipted tax bills, being the original records, were altered, and then the Special Assessment Roll, being a memorandum of account, was altered to conform to the first alteration. Altering the thousands of duplicate original receipted tax bills and then conforming the thousands of corresponding entries must have been a time-consuming task, and may be the reason for some of the many continuances of the trial obtained by petitioner. Petitioner offered no explanation in any brief or oral argument as to why it presented no evidence to clarify this damning activity on the part of its officers. The inescapable conclusion is that when a bill was stamped "Received Payment," cash had been received at that time and the subsequent alterations made to conceal that fact.

The Village auditor admitted that neither the Collector's

Daily or Monthly Reports conformed with these duplicate original tax bills (Tr. 195-243). He admitted upon being shown specific examples that on the dates stamped on these bills reflecting payment no other Village record accounted for any receipt on said dates (Tr. 225). He admitted that in a number of instances pro rata payments were made on bonds claimed by the petitioner as credits against a group of tax bills paid earlier. He could not explain how a bond could be received and cancelled in payment of a tax bill on one date and then receive a pro rata payment on it months or years later (Tr. 198). He testified that the total of collections of the 2nd installment were all cash in the amount of $49,076.90.

Mr. Chamberlain, another accountant witness for petitioner repeatedly testified that petitioner's records disclosed receipt of securities on 2nd installment bonds (Tr. 586). Another series of examples of unaccounted cash receipts was adduced from Mr. Chamberlain relative to Receipts of Deposits for Redemption (Respondent's Exhibits 6 through 16, Pl. Ex. Bk. pp. 42-63). As is alleged in Par. 10 of Counts I and II of the Amended Complaint, parcels of land with delinquent special assessment taxes not withdrawn from sale by direction of the Village and not sold, were forfeited to the State in accordance with the Statute. Property owners desiring to redeem these lots or parcels of land paid their money and received in exchange Receipts of Deposit for Redemption, which state on their face that there had been deposited with the Village Collector a certain sum of money to redeem the lots described.

In the case of *Friedman* v. *City of Chicago*, 374 Ill. 545, decided on October 11, 1940, the Supreme Court of Illinois held that the 1939 Amendment of Section 89 of the Local Improvement Act, which permitted the use of securities as payment for Certificates of Re-

demption, was not applicable to previously issued bonds. Respondent's Exhibit 6 (Pl. Ex. Bk. p. 42) is a Receipt of Deposit for Redemption signed by the Village Collector of petitioner acknowledging receipt of the sum of $674.99 to redeem certain lots belonging to the Catholic Bishop of Chicago from forfeiture. This Receipt was dated January 12, 1942 (Tr. 669-677). The transaction of payment reflected by this Exhibit was not recorded in the Village books until September 16, 1943, twenty months later than the date it bore (Tr. 667). At this time, September 16, 1943, the Collector reported this transaction as having been paid with securities. Similar transactions with various ranges of dates, but all reported as having been paid with securities on September 16, 1943, are shown in Exhibits 7 through 16 inclusive (Pl. Ex. Bk. pp. 44-63). No evidence was offered by the Village to account for the sums of cash reported on these Certificates as collected or to in any wise explain either the discrepancy in dates of recordation on the Collector's books or the claimed credit of security receipts therefor. Obviously, it was illegal in January of 1942 to accept securities as payment for Certificates of Redemption. The Village was well acquainted with the case of *Friedman* v. *City of Chicago,* 374 Ill. 545 in 1942, since it was a party to the case entitled *Murray* v. *Village of Skokie,* 379 Ill. 112 (1942), decided on January 20, 1942, holding that certain practices by the Village in splitting bonds was an attempt to circumlocute the *Friedman* case. Most important is the fact that the Village prepared corresponding duplicate original receipted tax bills for these Certificates of Deposit for Redemption. Examples of these appear in Plaintiff's Exhibit Book pp. 43-63. Here are undisputed examples of duplicate original tax bills claimed by the petitioner to have been paid with securities on September 16, 1943, when they obviously were paid with cash on January 12, 1942.

Section 89 of the Cities and Villages Act, Chapter 24, Sec. 795 of the 1933 Ill. Smith-Hurd Rev. Stat., states:

> "Any property owner may pay his assessment wholly or in part, with the bonds or vouchers issued under this Act on account of such assessment, applying, however, the bonds and vouchers of such series only to the payment of the installments to which they relate. In making such payments, such vouchers and bonds shall be taken at their par value and interest accrued to the date of making such payment. All vouchers and bonds received in payment of such assessment shall be cancelled by the officer receiving the same as of the date of their receipt, and deposited with the Treasurer of the city, town or village issuing the same."

In can be readily seen from this Statute that three tests apply to the securities claimed as offsetting credits by petitioner from the total of duplicate original receipted tax bills. First: the property owner must be a bondholder; secondly: the bonds can only be used in payment of installments to which they relate; and third: all bonds must be cancelled as of the date of their receipt.

That portion of the Statute dealing with cancellation of the bond upon receipt of it as payment of an assessment was construed in *Friedman* v. *City of Chicago*, 374 Ill. 545, where the Court stated at page 550:

> "To cancel is to nullify, declare null and void; to set at naught the provisions of the instrument cancelled and to declare them null and void * * * cancellation of any form of contract necessarily includes a waiver of all rights under it by the parties."

As has been demonstrated by both the testimony of Mr. Blunt, and the admissions of Messrs. Moore and Chamberlain, petitioner's witnesses, the bonds claimed by the Village as credits bear perforated dates of cancellation differing from the dates of the duplicate original receipted tax

bills from several days to four years. In addition, many of these bonds received pro rata payments subsequent to the dates shown on the groupings of tax bills for which they were claimed as payment. No witness for petitioner explained how or why this was done. Obviously, it is prohibited by the statute to do aught but cancel the bond as of the date of its receipt in payment of a tax bill. If, therefore, the defense of the Village was that these bonds were received in payment of a tax bill on the date the tax bill was stamped paid, the only issue in this case would be under the alternative relief prayed for in Count II of the Amended Complaint, to-wit: Was this a valid payment of taxes? However, no scintilla of evidence was offered by the petitioner to this effect. The record presented by the petitioner on this question, is simply that the Collector reported the securities received on dates corresponding with the cancellation of the bonds which were from months to years later than the dates of payment of the tax bills. We submit that the conclusion reached by the Master relative to the alteration of the duplicate original receipted tax bills, was the only one upon which all reasonable men would concur after studying this record:

> "From the foregoing it appears that the alteration of the original records was made to conform with transactions within the Collector's office occurring after the date on which the collection was made." (Tr. 1106).

III.

The petitioner falsely asserts that the Court of Appeals treated its admission of $5,000.00 being owed as one of liability upon which the judgment was predicated. In the first place, the Court of Appeals expressly refused to pass on this contention and stated:

> "In as much as the defendant's liability to plaintiff has been determined by the special master upon the basis of an accounting, and such basis and the amount of liability are approved by this court, the judgment for $5,000 must be vacated and set aside. In view of our disposition of the entire controversy, we do not pass upon the contentions presented with respect to this phase of the litigation." (Tr. 1191.)

In the second place, the Special Master ruled that an accounting was necessary to determine whether or not $5,000.00 or more was due respondent (Tr. 1098). It was only after petitioner failed to accurately and fully account in four abortive attempts that respondent obtained leave to reopen its case and present a full and complete accounting. This accounting showed the actual money collected. Petitioner did not explain the errors and omissions found in its records through this audit, nor did it put in any evidence refuting these cash collections. Obviously this third reason of petitioner's is a woebegone attempt to confuse the issues before this Court.

CONCLUSION.

The record is replete with evidence supporting the Special Master's findings upon which the Court of Appeals commented with sparkling clarity. There is no conflict between this decision and the Illinois law. The situation is simply that a municipality occupying a fiduciary relationship with respondent sought, through Machiavellian alterations of its records, to conceal its liability for diverting funds collected by it. Fortunately for respondent, the duplicate original receipted tax bills were found and evidence adduced that they had been altered after the case commenced. From these duplicate original receipts, and despite their alteration, it was possible to show what actually had been collected. Petitioner stands convicted by its own Treasurer's records which showed the 24,350 duplicate original receipted tax bills as cash receipts. In the face of all this evidence, petitioner, its officers and employees, stood mute.

We respectfully urge that the petition for writ of certiorari be denied.

HOWARD A. BRUNDAGE,
CHARLES F. SHORT, JR.,
Attorneys for Respondent, The First National Bank and Trust Company of Racine, Wisconsin.